fines generally may be imposed up to SR 1,000,000, and prison sentences may extend for as long as ten years for each offense.[58]

The Old Antibribery Law remained in effect without change for nearly thirty years until August 1991 when it was amended by resolution of the Council of Ministers to provide for sanctions against domestic and foreign entities whose employees are charged with bribery if the offense was committed for the account or benefit of the entity.[59] Prior to the issuance of Resolution No. 17, the Old Antibribery Law had provided for sanctions solely against individuals engaged in proscribed conduct. Resolution No. 17 provided for the imposition of a fine against violating entities not to exceed ten times the value of the bribe and/or the banning of such company from participating in supply and public works contracts with the government and public corporations for not less than five years. The New Antibribery Law incorporates the amendments introduced by Resolution No. 17.

Sweden*

On July 1, 1993, new legislation in the competition area became effective in Sweden. The new legislation, succinctly called the Swedish Competition Act (the Act), closely follows EC law, most notably articles 85 and 86 of the Treaty of Rome.[1] Sweden is, of course, not a member of the EC, but the Swedish legislature has nevertheless opted to follow the EC rules and thereby conform Swedish law in the area to that of most of Western Europe.[2] Indeed, the Act may give Sweden national competition legislation that is closer to the EC supranational rules than that of any existing EC Member State.

58. New Antibribery Law, *supra* note 53, arts. 1-3, 5, 7, 9. Lesser sentences are specified for violations by public employees who act or refuse to act in their official capacity at the request or recommendation of a third party, rather than in exchange for monetary or other gain. *Id.* art. 4.

59. Council of Ministers Resolution No. 17 dated 16/2/1412 A.H. (corresponding to August 26, 1991), published in *Umm Al Qura*, issue no. 3373, dated 12/3/1412 A.H. (corresponding to September 20, 1991) [hereinafter Resolution No. 17]. Resolution No. 17 also amended the Regulations to Combat Forgery issued under Royal Decree No. 114 dated 26/11/1380 A.H. (corresponding to May 11, 1961) to provide for sanctions against foreign or domestic entities whose employees are convicted of forgery.

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1. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter Treaty of Rome].

2. Sweden has applied for accession to the European Union, and the Agreement on a European Economic Area, which came into effect on January 1, 1994, and which Sweden has signed, requires its members to accept the EC competition rules.

The Act also represents a fundamental change in the Swedish judicial approach to the regulation of anticompetitive practices. Under the old law, i.e., pre-July 1, activities that might restrict competition were generally allowed, unless, under a broadly worded clause, they were actually found to be anticompetitive. Thus, while the old system allowed for intervention against many types of anticompetitive activities, it was limited to intervention against individual cases of abusive behavior. The new legislation, on the other hand, like its EC equivalent, only applies to certain behavior, but it prohibits such behavior and declares it null and void without any examination or decision in the individual case.[3]

I. Operative Provisions

The operative provisions of the Act consist of three main parts: (1) a prohibition against concerted action that adversely affects competition; (2) rules against abuse of a dominant position; and (3) merger control rules.

A. Concerted Action Restrictive of Competition

The Act's provisions against agreements restrictive of competition are, with a few adjustments due primarily to the Act's status as Swedish national legislation[4] and to incorporating established EC practice, a virtual translation of article 85 of the Treaty of Rome. Thus, section 6(1) of the Act prohibits agreements between undertakings that have as their object or effect to prevent, restrict, or distort competition in the Swedish market to an appreciable extent.

Section 6, like other provisions of the Act, is intended to be interpreted in accordance with EC law. Accordingly, the term "undertaking" includes any "natural or legal person engaged in activities of an economic or commercial nature," a very broad definition.[5] The nationality or location of the undertaking or its owners is irrelevant.[6] Similarly, the term "agreements" also has the same broad meaning as under EC law. For example, traditional civil law requirements for a contract need not be satisfied and a legally nonbinding, so-called gentlemen's agreement qualifies. Indeed, even a unilateral and voluntary action by an undertaking that limits its freedom of action towards another may qualify as an agreement provided that there is some form of understanding or concert. On the other hand, if no such concert exists, the unilateral actions of an undertaking, no matter how

3. Transitional provisions enabled undertakings, within six months of the effective date of the Act, to (1) apply for an exemption or a negative clearance (discussed below), (2) alter the prohibited agreement, or (3) terminate the agreement.

4. For example, unlike article 85 of the Treaty of Rome, *supra* note 1, no effect on interstate trade is necessary.

5. Swedish Competition Act § 3(1).

6. An agreement's effect in Sweden provides jurisdiction under the Act. Thus, even if an agreement is entered into abroad by foreign parties, the Act applies if competition within Sweden is affected.

anticompetitive, fall under the scope of the Act only if the undertaking has a dominant position on the market in question.[7]

The term "agreement" finally also includes "concerted practices" between undertakings, a more informal form of collusion aimed at situations where no formal agreement can be found or proved, but a coordinated behavior can be identified. Experiences from the EC show that it is often very difficult to distinguish between concerted action, which may be prohibited, and parallel action, which the law allows. The distinction will turn on evidence, that is, who has the burden of proof and by what weight it must be proven. Guidance may, as usual, be found in EC case law.[8]

1. *Exclusion of Certain Agreements*

Because certain areas are subject to special regulation in Sweden and because the concept of concerted action implies the involvement of at least two parties, certain types of agreements are expressly or impliedly excluded from the Act. First, the Act expressly excludes agreements between employers and employees concerning wages and other conditions of employment.[9] Second, principals and agents are viewed as one economic entity; consequently agreements between them are not "agreements" under the Act. Third, related undertakings, such as parents and subsidiaries[10] are also deemed to form an economic unit, and agreements between them, at least when the agreements relate to the internal division of labor and the subsidiary has no real freedom to act independently, are normally not considered restrictive of competition. The Act does not specify what level of ownership is necessary[11] or how independent a subsidiary may be, and EC competition law provides no clear answer. Legislative history does, however, indicate that the Swedish lawmakers only intended the exception to

7. The definition of an "agreement" also includes "decisions by an association of undertakings." Swedish Competition Act § 3(3)(1). Such decisions need not be binding on the association's members to constitute an "agreement," making recommended or suggested retail price lists issued by, for example, trade associations subject to the Act.

8. The area is, however, not very developed under EC law. It is settled that the plaintiff has the primary burden of proving the existence of a concerted practice, but it is less clear by what standard that burden must be discharged. For example, recent decisions in the EC seem to place a fairly light burden of proof on the plaintiff. *See, e.g,* Joined Cases 29 & 30/83, Compagnie Royale Asturienne des Mines S.A. and Rheinzink GmbH v. Commission, 1984 E.C.R. 1679, 1702, 1 C.M.L.R. 688 (1985), where the ECJ held that it is, under certain circumstances, enough for the plaintiff to discharge its burden of proof by presenting a logical hypothesis (to the effect that a concerted practice is at hand), and thereby shift the burden of proof to the defendant who must then present proof of its innocence.

9. Swedish Competition Act § 2. In Sweden, these types of agreements are to a large extent regulated by collective bargaining.

10. The same principle should also apply to agreements between sister companies.

11. Although not free from doubt, under EC law, ownership of less than 50% may conceivably be enough, provided there is nevertheless effective control through shareholding, voting, or board members. *See* IVO VAN BAEL & JEAN-FRANÇOIS BELLIS, COMPETITION LAW OF THE EEC ¶ 208, at 27 (2d ed. 1990).

include agreements that concern the internal allocation of tasks between related undertakings.[12] Fourth, and finally, an agreement that results from government compulsion also falls outside the scope of the Act.

2. *Minor Agreements*

Similar to the de minimis rule in EC law,[13] section 6 of the Act requires for its application that the restriction on competition in Sweden be "appreciable." A combination of the size of the undertakings and the market share of the products involved determines whether the effect on competition is sufficiently appreciable. Accordingly, agreements between small or medium-sized undertakings that involve approximately 10 percent of the relevant product market may be regarded as de minimis. A slightly higher market share is acceptable if the participants are very small (annual turnovers of less than SKr 10 million [approximately $1.2 million]). Restrictive agreements involving large undertakings are unlikely to benefit from the de minimis exception, regardless of the market share of the products involved. Section 6 finally contains a nonexhaustive list of practices to which the prohibition particularly applies, of which various forms of price fixing and market division are the most significant.

3. *Exemptions*

The prohibition contained in section 6 of the Act is not absolute. First, the Act authorizes the Swedish Competition Authority (the Competition Authority) to exempt an otherwise prohibited agreement in individual cases, provided the parties notify the Competition Authority and the agreement satisfies certain conditions laid down in section 8 of the Act.[14] An individual exemption is valid for a specified period and is, as a general rule, retroactively effective to validate the agreement from the date of its execution. A rule that may have great practical importance as an alternative to a formal grant of an exemption is that if the Competition Authority does not object to an agreement within three months of receipt of the notification, the law grants the agreement an exemption for five years from the date of its execution.[15]

Second, to alleviate the burden on the Competition Authority and to promote

12. Similarly, EC law probably provides that if the agreement goes beyond the internal relationship between related undertakings and involves, for example, obstacles to market entry by another undertaking, the exemption does not apply. *Id.*

13. Commission Notice on Agreements of Minor Importance, 1986 O.J. (C 231) 2, replacing the previous notice.

14. The four conditions, which must all be met before an exemption can be granted, are that the agreement: (1) contributes to improving the production or distribution of goods or to promoting technical or economic progress; (2) allows consumers a fair share of the resulting benefits; (3) only imposes on the undertakings concerned restrictions that are not indispensable to the attainment of the beneficial results; and (4) does not afford the undertakings involved the possibility of eliminating competition in respect of a substantial part of the products in question.

15. Swedish Competition Act § 13(1).

legal certainty, section 17 empowers the government to issue "block exemptions," that is, exemptions that apply to categories of agreements without any notification. By early 1994, regulations concerning nine such categories of agreements had been issued, including eight adopted from the EC system.[16] Indeed, because the Swedish legislature has virtually incorporated the EC regulations into Swedish law, EC interpretations and guidelines will be particularly important in this area.

Finally, an undertaking that has any doubt as to the legality of an agreement may as an alternative to an exemption seek a negative clearance. By issuing a negative clearance, the Competition Authority declares that, on the basis of the facts provided by the applicant or otherwise within the possession of the Competition Authority, an agreement or practice does not fall within the scope of section 6.[17] While a negative clearance binds the Competition Authority, it has only probative value in a court of law.

B. Abuse of a Dominant Position

Section 19 of the Act contains rules concerning abuse of a dominant position that are very similar to equivalent provisions of the Treaty of Rome.[18] Accordingly, EC case law and other interpretations will be important in this area.

With respect to what market share amounts to a dominant position, legislative history to the Act provides that, as a general rule, a market share exceeding 65 percent almost always constitutes a dominant position, and 50 percent or more creates a presumption of dominance. On the other side of the spectrum a market share of less than 30 percent does not in itself indicate a dominant position. As to market shares between 30 and 50 percent, factors such as financial strength, superior technology, and obstacles to market entry will be important.

Finally, because section 19 applies to abusive behavior, it does not provide for any possibilites of an exemption, whether individual or group.[19]

C. Merger (or Fusion) Control

The Swedish merger control rules in effect prior to the Act were not considered very effective, with the result that Sweden has large concentrations in a number of industry sectors. To provide a more modern and efficient system, the Act,

16. The categories are: (1) exclusive distribution agreements, (2) exclusive purchasing agreements, (3) patent license agreements, (4) motor vehicles distribution and servicing agreements, (5) specialization agreements, (6) research and development agreements, (7) know-how licensing agreements, (8) franchise agreements, and (9) agreements concerning chains of retailers (the only non-EC category).

17. Swedish Competition Act § 20.

18. Treaty of Rome, *supra* note 1, art. 86.

19. It is, however, possible to obtain a negative clearance to the effect that a certain practice does not fall under the prohibition of § 19. Swedish Competition Act § 20.

again in basic accord with EC rules,[20] contains a system of rules aimed at control of concentrations of undertakings.[21] The rules focus on acquisitions that either create or strenghten a dominant position that has harmful effects on competition in Sweden.[22] The rules require notification of all mergers of a certain size and empower the Stockholm City Court to prohibit harmful mergers. Thus, any acquisition of an undertaking where the combined worldwide turnover of the participants in the preceding financial year exceeded SKr 4 billion (approximately $500 million) must be notified to the Competition Authority.[23] If the buyer belongs to a group of companies, the combined turnover of the entire group will constitute the buyer's turnover for purposes of calculating the threshold amount. Upon notification, the Competition Authority has thirty days to decide whether to initiate a "special investigation" into the acquisition or to clear the acquisition. During that period the parties to the acquisition may not proceeed. After initiating a "special investigation," the Competition Authority has three months to bring an action in the Stockholm City Court to have the acquisition prohibited. The Stockholm City Court, in its turn, has six months to decide the case. The decision of the Stockholm City Court may be appealed to the Market Court, which must decide the case within three months.[24] The decision renders an acquisition that is finally prohibited null and void.

Finally, acquisitions effected on a Swedish or foreign stock exchange are exempted to the extent that they may not be prohibited. Instead, in such acquisitions the buyer may be ordered to dispose of the acquired assets.

II. Sanctions

Unlike the old law, sanctions under the Act are strictly civil; violating the Act incurs no criminal penalties. Two general types of sanctions are available. First, the Competition Authority may impose fines to enforce various parts of the Act.[25] It may also petition the Stockholm City Court to impose a special "anticompetitive behavior charge" on any undertaking that has intentionally or negligently violated

20. *See* Council Regulation 4064/89 of 21 December 1989 on the Control of Concentrations between Undertakings, 1989 O.J. (L 395), 1990 O.J. (L 257) 13 (corrected version).

21. The Swedish merger rules are aimed at domestic control and will in principle not apply to mergers large enough to be subjected to the EC merger control system.

22. The merger control rules apply to acquisitions or mergers of undertakings that carry on business in Sweden. Swedish Competition Act § 4(1). Thus, acquisitions of undertakings that do business outside Sweden only do not fall within the scope of the merger provisions of the Act, regardless of whether the acquiring undertaking is Swedish or not.

23. *Id.* § 37. Compare the EC rules where notification is required when (1) the combined annual turnover of the participants exceed ECU 5 billion and (2) the individual Communitywide turnover of at least two of the undertakings concerned exceed ECU 250 million. Thus, unlike the EC rules, the Act does not allow a very large undertaking to acquire a small undertaking without notification.

24. *Id.* §§ 39(2), 42. During this time, that is, after the initial 30 days during which the parties may explicitly not proceed with the acquisition and until the matter is finally decided, the Competition Authority may petition the Stockholm City Court for an interim prohibition order. *Id.* § 41(1).

25. *Id.* § 57. No maximum is set for such fines.

the prohibitions laid down in sections 6 or 19. That charge may be set at between SKr 5,000 (approximately $600) and SKr 5 million (approximately $600,000) or an amount in excess thereof, but not exceeding 10 percent of the undertaking's annual turnover for the preceding financial year.[26] Second, any agreement, or part of an agreement if such part is severable, that violates the prohibition against restriction of competition and any prohibited merger or aquisition is null and void. Finally, parties and affected third-party undertakings may seek civil damages from any undertaking that intentionally or negligently infringes the prohibitions of sections 6 or 19. However, the general public, that is, consumers, are not entitled to sue for damages under the Act.

III. Administration, Enforcement, and Appeals

The authority charged with the primary responsibility of enforcing and administering the Act is a newly formed governmental authority, the Swedish Competition Authority. The Competition Auhority may, as discussed above, seek and impose fines to enforce its decisions under the Act as well as petition the Stockholm City Court to impose substantial monetary penalties for violations of the Act. It also has, similar to the European Commission, considerable fact-finding powers. It may, under penalty of a fine, order the submission of documents and require persons to appear at a hearing. It may also, with the permission of the Stockholm City Court, conduct on-the-spot investigations of parties' and third parties' premises, where it may review documents, make copies, and conduct interviews. Refusals to submit to such investigations may lead to fines. Indeed, the Competition Authority may be the kind of national competition authority that some EC commentators suggest EC Member States need in order to improve the effectiveness of the EC competition laws.[27]

Finally, and generally, appeals of decisions by the Competition Authority may be made to the Stockholm City Court. Its decisions and judgments may be appealed to the Market Court, the court of last resort.

IV. Conclusion

The Act is an interesting case of national legislative adoption of an existing system of supranational rules. Such adoption may have advantages over newly written legislation in terms of proven effectiveness and foreseeability, but there may also be problems because rules created to govern one system may not in all aspects be suited for another. For example, the Swedish national market is

26. *Id.* § 27. Note that, with respect to undertakings that are part of a group, unlike similar EC provisions, the maximum charge is based on the targeted undertaking's individual turnover.

27. *See, e.g.*, Alan J. Riley, *More Radicalism, Please: The Notice on Co-operation between National Courts and the Commission in Applying Articles 85 and 86 of the EC Treaty*, 3 EUR. COMPETITION L. REV. 91 (1993).

in many ways different from the European market in general, a fact that may cause Swedish courts and authorities to apply certain provisions of the Act differently than would their EC counterparts. The Act also has a different and more limited goal than its EC ecquivalent, which has as its broad and overriding goal to further the integration of a single market. It is, therefore, probable that Swedish application and interpretation will at least in some areas be less "political" and use a different analysis. Indeed, while the legislature's clear intent is that the Act be interpreted in accord with EC law, neither the Competition Authority nor Swedish courts are bound by EC decisions or interpretations. Thus, time will tell how closely Sweden will follow the rules after which its new legislation is patterned. Without doubt, however, anything but a fairly close alignment will to a great extent defeat the major purposes of the new law: to conform Swedish law in the area to that of the rest of Western Europe and to subject Swedish and other multinational companies operating in Sweden to one less set of rules.